No. 11,418.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE WAREHOUSE COMPANY (a corporation),
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

CAPITOL CHEVROLET COMPANY (a corporation),
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

V. J. McGREW,
Appellant,

vs.

DEFENSE SUPPLIES CORPORATION,
Appellee.

DEFENSE SUPPLIES CORPORATION,
Appellant,

vs.

CLYDE W. HENRY,
Appellee.

REPLY BRIEF OF APPELLANT, CAPITOL CHEVROLET COMPANY.

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REPLY BRIEF.

To the Honorable Judges Denman, Healy and Bone:

The appellant, Capitol Chevrolet Company, pursuant to leave granted, herewith files its Reply Brief.

The appellant, Capitol Chevrolet Company, first desires to supply the answers to questions asked by the Court during the oral argument on this appeal and to other questions asked during the argument on the appeal of the appellee herein against the judgment in favor of Henry.

Appellants also wish to answer matters contained in Appellee's Brief, both factually and as to matters of law.

In the afternoon session, after the submission of the cases against Lawrence Warehouse Company and Capitol Chevrolet Company, and during argument on the separate appeal of the Defense Supplies Corporation from judgment in favor of Clyde Henry, Mr. Miller, counsel for Defense Supplies Corporation, while not conceding that the lease between Capitol Chevrolet Company and the owners, Henry & Parella, exonerated the Capitol Chevrolet Company and the Lawrence Warehouse Company nevertheless took the position and conceded that paragraph 10 [R. 331] gave permission to the landlord at all times to enter upon the premises not only for the purpose of examining and inspecting the same, but also to make such repairs and *alterations*[1] therein or any other part of the

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[1]Alteration is defined as follows:

In 3 C. J. S., p. 899, in defining "alteration" it is said:

> *"As applied to buildings,* a change or substitution in a substantial particular of one part of a building for a building different in that particular; a change or changes within the superficial limits of an existing structure; and installation that becomes an integral part of the building and changes its structural quality; a substantial change therein; a varying or changing the form or nature of such building without destroying its identity."

In *Brill v. Miller,* 140 Appellate Division Reports, New York, at pages 602, 605, "alteration" is defined, in relation to buildings, as:

> "This will amount to much more than a mere 'alteration,' which is generally understood as meaning a change or changes within the superficial limits of an existing structure, or a change of form or state which does not affect the identity of the subject. (Century Dict.; Black River Imp. Co. v. Holl-

building as said landlord shall deem necessary, and he took the position further that if the Court agreed that the landlord had that right and that his men in entering the premises did so because of that right, that then he sought to hold Henry liable.

Judge Bone asked, during the course of this argument, to clarify just how McGrew came upon the premises.

The testimony shows that McGrew had got a card from Mr. Henry [Exhibit 8—R. 339] giving instructions to the watchmen at the Ice Palace to allow bearer, Mr. Tony Sanchez, to enter with his two men to remove *pipe and equipment* [R. 339]. It was signed Clyde Henry, the owner [R. 339]. Henry was listed as one of the part-

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way, 87 Wis. 590; Davenport v. Magoon, 13 Ore. 7; Warren R. R. Co. v. State, 29 N. J. L. 353.)"

In *Ex Parte Woo Jan,* 228 Fed. Reporter 925, at page 941, it is said:

> "But the word 'alter' is itself broad enough to cover a mere addition. In 3 Enc. L. & P., p. 333, it is defined to mean 'to make a thing different from what it was.' Now, a thing is made different from what it was when nothing more is done than to add something to it. So in 2 C. J. 1166, one of the definitions given of this word is 'to add to,' in support of which is cited Adams v. Shelbyville, 154 Ind. 467, 486, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; Atty. Gen. v. Atty. Gen., 20 Ont. 222, 247. In Adams v. Shelbyville, he court said:
>
> > 'Alter' is to 'make otherwise.' Webster's Int. Dict. * * * From the power to alter is necessarily implied the power to add to or diminish.'
>
> And in Atty. Gen. v. Atty. Gen., Boyd, J., said:
>
> > "But even in rigorous construction 'to alter' would include 'to add.' Alteration may be by addition or subtraction.' "

It is plainly evident that the removal of the tank was an alteration authorized by the lease which the government approved.

owners of the premises entitled to enter it on plaintiff's Exhibit 10 [R. 340] for the purposes set forth in the lease. The lease gave him power to make alterations as he, Henry, "shall deem necessary" [R. 331]. When this card was presented to Mr. Kenyon he did not grant the permission until he called Mr. Turner, who in turn was the realtor and a person also listed on plaintiff's Exhibit 10, and who was the representative of the owners Mr. Henry and Mr. Parella [R. 336].

It is interesting to note that McGrew testified that when he and Mr. Sanchez first appeared upon the premises, with the card from Mr. Henry, the owner, the guard would not permit them to enter the premises until they had also cleared with Mr. Kenyon and Mr. Kenyon in turn cleared with the owner of the premises pursuant to the requirements of the lease [R. 280, 331].

There was nothing said by Mr. Sanchez or by Mr. McGrew or by anyone as to the type of instrumentality to be used in removing the tank. There is nothing shown in the evidence that Capitol Chevrolet Company ever knew that an acetylene torch was to be used.

The testimony is positive to the contrary that they did not know that an acetylene torch was to be used and that there was no mention of a torch [R. 194].

The removal of pipes and equipment as set out in the card did not bespeak of doing any act inherently dangerous and would not raise the suspicion of a normal and prudent person that such act or conduct would be danger-

ous or require unusual precautions or protection.[2] The Capitol Chevrolet Company was under a duty under the lease to permit such removal.

Judge Bone in his inquiries in the afternoon pointed out by way of questions that even the possession of an acetylene torch is not an inherently dangerous instrument and the evidence in this case does not show that it was an inherently dangerous instrument in and of itself and in the place it was being used, the engine room, which was not the place where the tires were stored.

Acetylene torches are used every day and are not considered fire hazards unless they are close to inflammable material and material which might quickly ignite (*Reliance Insurance Co. v. Pohlking,* 19 N. E. Section 906). They are not dangerous instruments as a matter of law, but only such in relation to their closeness to gasoline or other highly inflammable materials.

The cases to which Mr. Miller referred in his reargument, to wit, *International S. S. Co. v. Fletcher Co.,* 296 F. 855, C. C. A. (2) only holds that the use of an acetylene torch near inflammable material was negligence. In that case the use in *close proximity* to highly inflammable varnish material was held the proximate cause of damage by fire.

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[2]Section 21, California Warehouses Receipt Act, Deering Calif. General Laws, Act 9059, reads as follows:

> "§21. Injury to goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

In that case it was admitted that varnish remover was lavishly spread about the place and there was testimony by the inventors of the varnish remover that its composition was of alcohol, benzol and wax which were highly inflammable.

In the present case there was no showing of highly inflammable material in the engine room and there was no showing by the expert or anybody that the "slag", which are the drippings from the use of a cutting torch on metal, would have reached any place that was known to be inflammable or known to have highly inflammable material in it. In the case of *Lancashire Shipping Co. v. Morse Dry Dock & Repair Co.,* 43 F. (2d) 750, at p. 752, it was held:

> "The mere fact of an explosion on a vessel undergoing repairs with an acetylene torch would not render the repairman liable by negligence, as a proximate cause of the explosion must be shown." (*Lancashire Shipping Company v. Morse Dry Dock and Repair Company,* 43 F. (2d) 750, 752.)

The same case is also an authority for the proposition that the fact that a repairman engaged in repairing a vessel loaded with gasoline would use an acetylene torch resulting in an explosion was not such an act as could be foreseen.

In the case of *United States v. Todd,* 53 F. (2d) 1025, the Court finds that the tank tops in the five room were loaded with old pipe covering, debris and pieces of canvas, which resulted from respondent's work and which it was under contract obligation to remove (p. 1030). No such condition existed in the case at bar. The engine room, according to all the testimony was absolutely empty. A concrete wall between the engine room and the building

where the tires were stored gave strong precaution against danger.

It should also be borne in mind that McGrew's testimony, which is not contradicted in any respect, is that immediately preceding the discovery of the fire he was on his hands and knees cutting a piece of steel lying parallel to the concrete floor and raised up from that floor 8 inches on blocks and that the point at which he was cutting was at least 8 feet from each side wall and 15 to 20 feet from each of the end walls and "Slag" from a horizontal cut falls directly onto the floor under the cut and could not possibly bounce within the confined space between the metal and the floor and thus reach the side walls.

Mr. McGrew testified that his position during the cutting was on his knees with his hands in direct contact with the metal sometime, or at least close to the metal. [R. 245.] He testified he did not feel any heat, either through his knees or through his hands (p. 245). He testified further that the metal was not warmer than prior to any cutting operations that he performed. He said that he cut almost in a direct line, holding the torch at right angles to the metal cut that was being made and he moved along with the torch. He said that he felt no heat either through his knees or through his hands. [R. 245.]

Judge Bone asked during the afternoon sesssion whether this was an *Erie v. Tompkins* case (304 U. S. 64), referring, of course, we assume, to the duty of the Federal Court to follow the State Court's interpretation of its own laws.

The contracts in this case between the parties and approved by the Government and its agents places the duties of the Lawrence Warehouse and the Capitol Chevrolet

Company only as construed by the laws of the State of California. "Your general responsibility for the care and protection of the tires will be limited to such care as is required by laws governing warehouses in your state and to the exercise of ordinary care on your part." [R. 314.]

Of course, the court would also be bound by the decision of *Erie v. Tompkins* (304 U. S. 64).

Under the California rule, the burden of proof was on the plaintiff to show the negligence of the defendants as found by the trial court which was as follows:

> "On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained such premises and said goods in a negligent and carless manner so as to permit them to become ignited and destroyed by fire.. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire." [R. 81.]

The trial court jumped from the admission of the workman to the engine room pursuant to Henry's lease authority to another conclusion without supporting evidence. 1. That the defendants negligently permitted the use of said torch on said premises. There is not one word of evidence in the record that the defendants knew or permitted the use of said torch on said premises, but, on the contrary, the evidence is only that the watch-

man, appointed pursuant to the specific directions of the Defense Supplies Corporation and having no responsibility to the defendant, Capitol Chevrolet Company, was the only one who had any knowledge outside of McGrew and his helper that a torch was to be used.

The court also jumped at a conclusion that there was no adequate protection for said premises and said goods against the use of the torch when under the specific oral agreement between the Defense Supplies Corporation and the defendants, the control of protection for said premises by way of watchmen or any other persons present on the premises was directly and totally governed and controlled by the plaintiff, who specified to the man and to the detail just how the goods were to be stored and who was to protect or guard it, and who and what was to be on the premises. [R. 315, The Government's Exhibit 2; Plaintiff's Exhibit 9, R. 339, and Plaintiff's Exhibit 10, R. 340.]

It is interesting to note that the plaintiff did provide and direct that there should be nine tire pilers and stackers admitted [R. 341], but the plaintiff itself directed the hours and time when these men worked and the character of their work; and, when the fire occurred they had all gone to lunch, and the plaintiff itself was not only in control of the situation but it was therefore guilty of contributory negligence in not having enough men around to observe the fire and assist in its extinction after it started, since it was in the sole control and direction of all agents and personnel that could provide "adequate protection for said premises and said goods against the use of said torch." [R. 286, 339, 340.]

The burden was on the plaintiff to show by confident proof that the defendant could have done anything more

than it did do in maintaining proper and preventive lookouts when the plaintiff itself directed who should be hired, how many men should be hired, and who should be present. This certainly failed to meet the burden of proof cast upon the plaintiff.

Bartholomai v. Owl Drug Co., 42 Cal. App. (2d) 38.

The cases cited by the appellee in respect to acetylene torches are from other jurisdictions, to-wit: Illinois, Louisiana and New York.

The appellee concedes that it made no showing whatsoever as to the condition of the warehouse itself, as to whether there were fire precautions of kinds of hose, a sprinkler system or anything else within it. Judge Denman frequently commented about this situation.

It would be no comfort to Defense Supplies Corporation to say that this equipment was there but not used. This was not the alleged negligence found by the trial court. Furthermore the building between the engine tank and the place where the tires were stored was locked, and there was no accessibility, besides, except to the watchman and those designated by the plaintiff to be permitted in the place where the tires were stored, the only person on the premises to guard against fire was the watchman and according to express terms of the contract and the express designation by the Government was the only person required or permitted actually to be upon the premises to guard it or self-guard it from fire. He had complete dominion and control and was responsible to no one except his own superior, The Burns Detective Agency. He took no orders from the Capitol Chevrolet Company or the Lawrence Warehouse Company. The watchman

was from an agency approved and paid by the Government for the specific purpose of safe-guarding the materials. [R. 279-80; 286-88.]

The list of people who were permitted in the premises was furnished to Kissell by Mr. Harris of The Burns Detective Agency [R. 286], and is the list constituting Exhibit 10, and which was introduced in evidence as a Plaintiff's Exhibit by Mr. Miller on behalf of the Defense Supplies Corporation as a correct list of the persons permitted by the Defense Supplies Corporation to go upon the premises.

The list of names was furnished by the Defense Supplies Corporation. [R. 198.]

The duties of Capitol Chevrolet Company.

The duties of Capitol Chevrolet Company are set forth both in Section 1858-e of the Code of Civil Procedure of the State of California, and Section 21 of the Uniform Warehouse Act of California, and each of these required only that Capitol Chevrolet Company exercise the duty of an ordinarily prudent person under same or similar circumstances. (See footnote 2 for Section 21. Section 1858e is quoted on page 4 opening brief of Capitol Chevrolet Co.)

Capitol Chevrolet Company acted normally and prudently through its employees in permitting McGrew to come upon the premises pursuant to the requirements of the lease. When it was told that the only thing that was to be done was to *alter* the premises by taking out pipe and equipment, this was the right which the landlord had under the lease and Capitol Chevrolet Company would have been liable to the landlord had it not permitted them

to do what the lease permitted them to do. Therefore, there could be no negligence in doing what its contract required it to permit to be done under the express terms of the lease and which lease was in turn approved by the government, Defense Supplies Corporation, at the time of the making of the same. Therefore, Capitol Chevrolet Company cannot be held to be negligent for permitting McGrew to come upon the premises as argued by Mr. Miller during the afternoon session, nor has it been contended that Capitol Chevrolet Company was negligent in permitting McGrew to come upon the premises in so far as the opinion of the trial court was concerned. The negligence which that Court found, and upon which it based its opinion, is that it was Capitol's duty to anticipate fire hazards and maintain proper and preventive lookouts. [R. 171.] Capitol Chevrolet did maintain proper and preventive lookouts in accordance with express terms of the supplementary contract which required Capitol Chevrolet Company to rely on Burns Detective Agency as the proper and preventive lookout specifically so designated by the Defense Supplies Corporation, and which designation eliminated any and all other lookouts. The trial court further held that Capitol's act in storing valuable inflammable material in a wooden structure outside the city limits and far beyond speedy access to the City fire equipment was negligent. However, the location was picked by the Defense Supplies Company with full knowledge of its location outside the city limits. Furthermore, there is nothing in the record to indicate that the Sacramento County fire fighting equipment, which responded to the fire, was in anywise inferior to the Sacramento fire fighting equipment. The only delay was caused by the fact that the watchman not realizing that

the building was outside the city limits, first called the City Fire Department and was referred by them to the County Fire Department. [R. 282.] And other employees specifically designated by the Defense Supplies Corporation for employment and admission on the premises were absent.

It was plaintiff's "burden of proof" to prove how the fire occurred. This it failed to do. A judgment cannot be based on speculation. *Bartholomai v. Owl Drug Co.*, 42 Cal. App. (2d) 42.

The evidence as to the source of the fire is extremely doubtful and there were only two men on the premises, to wit, McGrew and Kissell, the watchman, when the fire broke out. The tire pilers had all gone to lunch.

After attempting to put out the fire by throwing some 15 gallons of water upon it, McGrew ran all the way around the building to notify the watchman. The watchman then spent the next ten minutes calling the fire department. By the time he had done this, he observed the fire within the main building where the tires were stored. Meantime McGrew ran back to the engine room and dragged out his oxygen cylinders to keep them from exploding. It is extremely doubtful if he and McGrew could possibly have put out the fire at that stage with any sort of fire fighting equipment and they did everything possible to summon the proper fire fighting department to cope with the situation.

Bearing in mind that the plaintiff had control of the personnel on the premises and their number and specific duties, in order for there to have been negligence for the non-use of fire fighting equipment in the main building, it would have been necessary to show that there were

sufficient persons present to effectively put out the fire with such equipment under the conditions. No attempt was made by the plaintiff to introduce any such evidence. It was the plaintiff who dictated just how many men there should be on the premises and just what their duties should be. It was, therefore, the plaintiff who was guilty of contributory negligence if negligence there was in not having men enough on the premises to handle the situation. Let us suppose that a fire had occurred in the middle of the night when only the watchman was present. Under such circumstances it is obvious that one watchman could not have effectively used a sufficient quantity of fire fighting equipment to put out a fire of the size that this fire had gained before it was discovered and his failure to do so would not be negligent. To be held liable the negligence of Capitol Chevrolet Company must be the proximate *cause* of the injury. Proximate cause is a cause from which a man of ordinary experience and sagacity would foresee that the result which if there was any evidence of negligence might ensue.

> The negligence of the warehouseman must be the cause of the injury. (Wharton, para. 576-597; *Roberts v. Gurney,* 120 Mass. 33; 15 Wall. 537; Shearman & R. on Neg., para. 8-9.) Proximate cause is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. (Shearman & R. on Neg., sec. 10; *Ill. C. R. R. Co. v. Benton,* 69 Ill. 174; *Smith v. Leavenworth,* 15 Kan. 81; *Scott v. National Bank,* 72 Penn. St. 471.) If there be no evidence of negligence, or a mere scintilla of evidence, the Court should grant a nonsuit. (*Cotton v. Wood,* 8 C. B. (N. S.) 568; *Brooks v. Somerville,* 106 Mass. 271; *Denny v. Williams,* 5 Allen, 1; *McCaig v. Erie R.*

R. Co., 8 Hun. 599; 104 Mass. 71; *Toomey v. L. etc. R. R. Co.,* 3 C. B. (N. S.) 146-150; *Cornman v. E. C. R. Co.,* 4 H. & N. 781; L. R., 3 App. Cas. 1155; 99 Mass. 612; *Briggs v. Oliver,* 4 Hurl. & Colt. 403; Shearman & R. on Neg., Sec. 11; 49 Cal. 257.)

Here there is no evidence tending to show that the defendant or its servants were negligent, or that its or their negligence was the approximate cause of the injury complained of. We have seen that in a case of this kind, the law will not presume negligence. We have also seen that the law emphatically condemns "surmise and imagination," when the verdict can rest upon nothing else. If, then, presumption, surmise, imagination, be excluded, the plaintiff's case rests alone, upon the facts, that there was a fire, and consequent loss, and the case has not, for the plaintiff, advanced beyond the point where it was when the complaint and answer were read to the Court and jury. We have also seen that "the burden of proof in an action upon negligence, always rests upon the party charging it." * * * And that, "It is not enough for him to prove that he has suffered loss by some event which happened upon the defendant's premises, or even by the act or omission of the defendant." He must also prove that the defendant in such act or omission violated a duty resting upon him. (S. & R., on Neg., Sec. 12.)

In *Wilson v. Southern Pacific R. R. Co.,* the Court said at page 172:

"But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. (*Harris v. Packwood,* 2 Taunt. 264; *Beardslee v. Rich-*

ardson, 11 Wend. 26; *Browne v. Johnson,* 29 Tex. 43; *Lamb v. Camden and Amboy R. R. Co.,* 46 N. Y. 271; *Jackson v. Sac. Val. R. R. Co.,* 23 Cal. 269.)

The negligence of the appellant, as the proximate cause of the loss of the property by fire, thus became the essential fact to recovery; and the burden of proof was upon the plaintiff in the action. It was incumbent on him to prove that the defendant had, by some act of omission, violated some duty, by reason of which the fire originated; or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit, the fire by which the property was destroyed."

In *Bartholomai v. Owl Drug Co.,* 42 Cal. App. (2d) at page 42, the Court said:

"The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of respondents. No evidence was produced which tended to prove that the false ceiling was erected by or under the direction of respondents, or that they had knowledge of the inflammable nature of the planks with which it was constructed. It was proved that the welding apparatus was being operated by respondent McDonald on a platform above the ceiling at the time the fire broke out, this witness describing the beginning of the fire as a rising of smoke through and between the planks which com-

prised this false ceiling, but there was no evidence tending to prove that he operated the welding apparatus in a negligent manner.[3]

Before respondent could be held to answer in damages for the injuries suffered by appellant, it was incumbent upon the latter to assume the burden of proof and show by a preponderance of the evidence that the negligence of respondents was the proximate cause of the fire. A judgment cannot be based upon guesses or conjectures. (*Reese v. Smith,* 9 Cal. (2d) 324, 328 [70 Pac. (2d) 933], citing *Puckhaber v. Southern Pac. Co.,* 132 Cal. 363 [64 Pac. 480].)"

Under the rule thus stated, Defense Supplies Company failed to prove its burden and taking the case as a whole there was no preponderance of evidence as Mr. Miller contended showing negligence on either the part of Capitol Chevrolet Company or Lawrence Warehouse. Neither in the opinion of Judge Goodman, in the brief submitted on behalf of the government, nor in the argument was any specific act of negligence or act of omission constituting negligence on the part of Capitol Chevrolet Company or Lawrence Warehouse Company called to the attention of the Court.

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[3]There is no proof by the plaintiff that McGrew operated his equipment in the engine room in a negligent manner.

Mr. McGrew said he spread two 5-gallon buckets of water on the cement and he observed the condition of the floor and that there was nothing on the floor in the nature of combustible material. [R. 234-235.]

He did not observe the concrete popping up during his cutting operation. [R. 235.]

During the course of his reargument of the case in the afternoon session, Mr. Miller stated that McGrew not having been a person named by the Defense Supplies Company in Plaintiff's Exhibit 10, Capitol Chevrolet following the terms of its contract, as amended by Plaintiff's Exhibits 9 and 10, was negligent in permitting McGrew upon the premises. The answer to that proposition is a simple one and that is that the government having approved the lease under which the owner reserved the right to enter the premises for repairs, alterations and other purposes, need not do that work himself, but could obviously have his employees enter the premises to make the necessary alterations or changes. It is a perfectly simple proposition that a lease permitting a landlord's entry for such purposes as are outlined in paragraph 10 of the lease does not mean that only the landlord himself as an individual may enter to perform those tasks, but that his agents or representatives in the performance of his work may have a right to do so. It is a matter of common knowledge that an owner of a building does not and need only generally make the alterations in a building himself, but has workmen or employees or independent contractors do it for him and these persons carry the same authority as he does. It should also be borne in mind that the final entry of McGrew and of Elmore, his helper, was permitted by the Burns Detective Agency watchman, who was one of the watchmen furnished by the agency approved and paid for by the government and taking orders from no one in Capitol Chevrolet Company.

Mr. Baxter of the Defense Supplies Corporation was the person who was in immediate contact, in charge of the warehousing or storing of tires in Sacramento, and it was

he who made the investigation which led to the storage of tires in the Ice Palace. [R. 142.]

He made a report to the Defense Supplies Corporation upon all conditions at the Ice Palace. He knew all the facilities of the Ice Palace at the time of its selection and how many men it would take to guide and to render it reasonably safe so far as the interest of the Defense Supplies Corporation was concerned.

It must have been assumed by the Defense Supplies Corporation that with nine tire pilers working that there would be plenty of watchmen at least during the day time. That the Defense Supplies Corporation did not provide for a shift for these men to go for lunch certainly is evidence of contributory negligence on their part.

The record does not disclose how near or how far the Sacramento Fire Fighting Department was located from these premises. This was the burden of proof on the plaintiff. If the Sacramento Fire Department was just a short distance away and was able to respond within a minute or two of any notification of fire or even within five or ten minutes, and it is not shown that such service was inadequate to the protection of this premises then there is no negligence on the part of defendants and the plaintiff has missed the burden of showing this on the part of the defendant.

Any fact relating to Mr. Baxter, of the Defense Supplies Corporation, in selecting the placing the requirements of what he thought was necessary upon the premises must be presumed to have taken all of this into consideration. It might be inferred also that the County Sacramento Fire Department was available quickly to at-

tend to any possible fire on the premises in that he only provided watchmen for the premises at night and that was the only person required or permitted to be upon the premises at night. It must be presumed that he considered these factors in determining how many men should be on the premises to watch or guide it or to fight any possible fire.

We notice that the floors in the engine room as well as the floors in the building were of concrete. There is no evidence of inflammability or inflammable materials in the engine room. Tires are in and of themselves not ordinarily considered inflammable although subject to destruction by fire. Nothing was in the engine room that could burn except two benches not near the work being done.

In *Runkle v. Southern Pacific Milling Co.,* 184 Cal. 714, the Supreme Court of California held in a decision which is binding on this Court because of its interpretation of the California law, that it is incumbent on the plaintiff in a suit against the warehousemen by one who has lost his goods through fire which destroyed the warehouse to "sustain the burden of showing defendant's negligence." This case which was cited by the appellee points out that the watchman in that case was intoxicated while in the scope of his employment and that negligence resulted from his inability to watch the premises properly because of that state of facts. In the present case the watchman quite contrary to the *Runkle* case was alert; he stopped the men from coming onto the premises when they first sought to come on, he later permitted them to come on with proper authority under the lease and cautioned them to take care of any danger against fire. He, and he alone, knew what they were going to do and how

they were going to do it. As an independent contractor named by Defense Supplies Company he had no duty to Capitol Chevrolet Company and did not inform Capitol Chevrolet Company of any of these facts. As an independent contractor paid by the government he had no duty. If he had been an employee of Capital Chevrolet Company and responsible to them he would have reported these facts to them. Instead, however, under the terms of his employment and payment he had no duty to do so and Capitol Chevrolet was entirely exonerated because of this superior control by the plaintiff over the instrumentality of precaution.

The Reply Brief of appellant, Lawrence Warehouse Company, argues other points and we adopt their argument as though fully set forth here.

In the course of the morning's argument, Judge Denman in the course of a question, assumed that the Burns Detective Agency were general watchmen. Judge Bone called attention to the trial court's note, on page 72 of the Record, to the effect that the armed guard service was purely an additional and independent protective activity to prevent pilferage of the tires.

In answer thereto we state that the trial court is completely in error. There is no evidence in the Record to indicate that the Burns Detective Agency's activities were in anywise so limited. [R. 285-6.] The stipulation of counsel for plaintiff contains no such restriction nor is there anything in the evidence of the guard himself to indicate that he felt his duties were so limited. The testimony is quite to the contrary that he had general supervision and control, taking his orders from the head of the Burns Agency. His actitivies with regard to ad-

mitting McGrew and otherwise demonstrated that fact. He cautioned McGrew and helper to be careful of fire, and they said they were. [R. 281.]

There was no expert testimony as to the cause of the fire, nor whether any sparks from the acetylene torch could possibly have caused the fire nor that McGrew's work was done carelessly or unsafely. The government produced an expert, but contrary to Mr. Miller's suggestions was not stopped by the Court from asking any questions. [R. 270-74.] The expert, Gus Johnson, testified he worked for a mining company and supervised acetylene torches by others. He was asked a question about whether an acetylene torch with the cutting flame directly downward toward the plate "would the heat from the torch or the burning metal, set fire to or ignite wood, grease, metal, tar, rags, or any other inflammable material that might be lying on the floor?" [R. 273.] The witness answered "Yes" and he was asked a few other questions about any inflammable material within 8 inches of where he was cutting. After which Mr. Miller concluded with him. This certainly did not meet any burden of proof showing the cause of the fire or that it was the result of negligent use of a torch or of any negligence in the removal of the pipe.

There was a limitation on the "expert's" cross-examination by the defense. But nothing was adduced which was relevant or material in determining the cause of the fire in this case.

No other testimony was offered to support the burden of proof as to how the fire occurred. The plaintiff made assumptions and relied on the trial court to guess, speculate and conjecture on the cause of the fire in its favor.

In conclusion we wish to point out that in the original brief submitted by Lawrence Warehouse Company two propositions were argued. The first being in reference to the inference of negligence drawn by the trial court, and the second with reference to the obvious conflict between the findings of fact. Neither of these propositions have been answered by the plaintiff either in its Reply Brief or in argument. We believe each of these propositions are also necessarily fatal to the government's case.

Mr. Miller urged the Court to be consistent. Judge Healy commented that the plaintiff should also be consistent, but since the plaintiff could not be consistent under the facts and proceedings of this case, it has blown hot and cold. It asks this Court to uphold its contentions which it has failed to prove by any evidence.

Wherefore, appellant Capitol Chevrolet Company prays that this Honorable Court reverse the judgment of the court below and hold that the Capitol Chevrolet Company as well as Lawrence Warehouse Company were not negligent under the facts of this case.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant Capitol Chevrolet Company.